85-1971

Supreme Court, U.S.
FILED
MAY 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PATRICIA M. MOUSSEAU,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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May 29, 1986

68 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit properly rejected the rule of three other circuits by holding that a federal agency defending a decision to deny an employee a periodic step increase before the Merit Systems Protection Board need only support that decision by substantial evidence under 5 U.S.C. 7701(c)(1)(A), rather than a preponderance of the evidence under 5 U.S.C. 7701(c)(1)(B).

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Other Authority:

S. Rep. No. 969, 95th Cong., 2d Sess. 10, reprinted in 1979 U.S. Code Cong. & Ad. News 2732 15

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner, Patricia M. Mousseau, prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Federal Circuit of February 28, 1986 holding that a substantial evidence standard of proof,

rather than a preponderance of the evidence standard is required in cases before the Merit Systems Protection Board involving a challenge to a federal agency's decision to deny a within-grade increase to an employee.

OPINION BELOW

The opinion below, which has not been published, is set out in the Appendix hereto. App. A.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on February 28, 1986. The Jurisdiction of this Court is invoked under 28 U.S.C. 2101(c).

STATUTORY PROVISION INVOLVED

This case involves 5 U.S.C. 7701(c)(1),[1] which prescribes the applicable burden of proof in cases brought before the Merit Systems Protection Board:

> (T)he decision of the agency shall be sustained...only if the agency's decision--
>
> (A) in the case of an action based on unacceptable performance described in §4303 of this title, is supported by substantial evidence, or
>
> (B) in any other case, is supported by a preponderance of the evidence.

STATEMENT OF THE CASE

A Legislative Background

Section 5335 of Title 5 of the United States Code prescribes "periodic step-increases" in rates of pay for "(a)n employee paid on an annual basis, and

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[1] Statutory references are to Title 5 of the United States Code unless otherwise noted.

occupying a permanent position within the scope of the General Schedule, who has not reached the maximum rate of pay for the grade in which (the) position is placed...." §5335(a).

The frequency of eligibility for a step-increase depends on one's step, or "pay rate," within the grade:

> (Qualified employees) shall be advanced in pay successively to the next higher rate within the grade at the beginning of the next pay period following the completion of--
>
> (1) each 52 calendar weeks of service in pay rates 1, 2 and 3;
>
> (2) each 104 calendar weeks of service in pay rates 4, 5 and 6; or
>
> (3) each 156 calendar weeks of service in pay rates 7, 8 and 9.... Ibid.

Entitlement to a step increase is not automatic; it is conditioned, in most pertinent part, on a determination "by the head of the agency" that "the work of the

employee...is of an acceptable level of competence...." §5335(a)(B).

In the event the agency determines that an employee's work is not "of an acceptable level of competence [or "ALOC"]," §5335 provides that

> the employee is entitled to prompt written notice of that determination and an opportunity for reconsideration of the determination within his agency under uniform procedures prescribed by the Office of Personnel Management. If the determination is affirmed on reconsideration, the employer is entitled to appeal to the Merit System Protection Board. §5335(c).

B. Course of the Proceedings

The petitioner, Patricia M. Mousseau, has been a civilian employee of the Department of the Army ("Army" or "agency" hereafter) since October 1977, when she was appointed to a GS-5 secretarial position in the Protocol

Office for the Headquarters of the United States European Command. She received a promotion to a GS-6 grade level in October 1978, and, on June 21, 1978, converted to a GS-6 protocol assistant position.

She also earned periodic step increases as she became eligible for them under §5335.[2] Thus, by October 1981, Ms. Mousseau occupied a GS-6, step 4, position. She was next eligible for a within-grade increase on October 23, 1983.

On March 8, 1984, the agency formally notified Ms. Mousseau that it intended to withhold her periodic step increase ("within-grade increase" or "WGI" hereafter), otherwise due her the

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[2]She did not receive an increase in the year she was promoted. Section 5335(a)(A) precludes a step increase in any year "the employee...receive[s] an equivalent increase in pay from any cause during that period...."

preceding October.[3] The agency alleged 12 instances of deficient performance in three areas of responsibility, "[p]repares items for formal dinners," "[p]repares items for formal luncheons"; and "[m]aintains listing of key individuals." (App. C)

Ms. Mousseau sought reconsideration of the decision under §5335(c), asserting inter alia, that during the greater part of the 104-week waiting period her performance had been altogether satisfactory; and responding to the specific allegations by denying them in large part, or by alleging that missed deadlines had been arbitrary or the product of overwork. The deciding

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[3]Section 5335(c) entitled Ms. Mousseau to "prompt written notice" of a negative determination. OPM, however, required only that the determination "be communicated...in writing as soon as possible after completion of the waiting period...." 5 C.F.R. 531.409(e) (1984).

official sustained all but one of the charges, however, and denied Ms. Mousseau's request for reconsideration on May 8, 1984.

Thereafter, Ms. Mousseau petitioned for appeal to the Merit Systems Protection Board. See 5 U.S.C. 7701(a). Following a hearing conducted pursuant to 5 C.F.R. 1201.51 et seq., a presiding official of the Board sustained the agency's denial of the within-grade increase in an initial decision dated September 28, 1984. She sustained all but one of the 11 remaining charges against Ms. Mousseau, holding that "the agency has shown by substantial evidence that it properly denied the appellant a within-grade increase because her performance was not at an acceptable level of competence. See Parker v. Defense Logistics Agency, 1 MSPB 489 (1980)" (App. C-23).

Ms. Mousseau petitioned the full Board for review, primarily on the ground that the evidence was insufficient to sustain the denial. The Board found that the petition did not meet the criteria for review set out by 5 C.F.R. 1201.115, and sustained the initial decision. It did, however, reject two of the allegations the presiding official had sustained (App. B-2 - B-3). Thus, of the 12 charges originally leveled against her by the agency, just eight were ultimately sustained against Ms. Mousseau, based on a substantial evidence standard of proof.

Ms. Mousseau then petitioned for review in the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. 7703(b)(1). She argued that 5 U.S.C. 7701(c)(1) required the Board to hold an agency to a preponderance of the evidence, rather than a substantial

evidence standard of proof in denial of within-grade cases; and asked that the case be remanded for consideration in light of the appropriate standard of proof.

A panel of the Federal Circuit affirmed the Board by decision dated February 28, 1986, on which judgment was entered the same day. The court held simply that it was bound by the decision of its predecessor court on the point, Meyer v. Department of Health and Human Services, 666 F.2d 540 (Ct. Cl., 1981), which had been expressly approved in Romane v. Defense Contract Audit Agency, 760 F.2d 1286, 1288 (Fed. Cir. 1985) (App. A-6 - A-7). This petition for writ of certiorari follows.

REASON FOR GRANTING THE WRIT

The Court Should Grant the Writ Because the Federal Circuit Has Failed to Require Application of a Standard of Proof Expressly Mandated by Congress, or to Address Contrary Holdings By Each of the Three Other Circuits That Have Considered the Question

Section 7701(c)(1) prescribes the standards of proof to be applied to cases appealed to the Board. In most pertinent part,

> the decision of the agency shall be sustained...only if the agency's decision--
>
> (A) in the case of an action based on unacceptable performance described in §4303 of this title, is supported by substantial evidence, or
>
> (B) in any other case, is

supported by a preponderance of the evidence.[4]

Section 4303, which is headed "[a]ctions based on unacceptable performance," "describes" only two actions, reduction in grade and removal. §4303(a). Ms. Mousseau's denial of within-grade case concerned neither removal or reduction in grade, and thus, in accord with the literal language of the statute, was one of the "other case[s]" covered by subsection (c)(1)(B).

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[4]Board regulation mirrors these evidentiary requirements. See 5 C.F.R. 1201.56(a). The Board defines substantial evidence as "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true," §1201.56(c), which derives from the classic formulation in Consolidated Edison Co. v. NLRB, 315 U.S. 197, 229 (1938); while it defines a preponderance of the evidence as "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter is more likely to be true than not true." Ibid.

Nevertheless, the Board followed its decision in Parker v. Defense Logistics Agency, 1 MSPB 489 (1980), which held the substantial evidence standard applicable in §5335 cases.

Parker in turn was endorsed by the United States Court of Claims[5] in Meyer v. Health and Human Services, 666 F.2d 540, 544 (Ct. Cl. 1981), which the panel below held it was constrained to follow in this case[6] (App. A-6). See South Corp. v. United States, 690 F.2d

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[5]The Court of Claims was abolished by the Federal Courts Improvements Act of 1982, Pub. L. 97-164, 96 Stat. 25. The United States Court of Appeals for the Federal Circuit assumed its appellate functions October 1, 1982. It also assumed exclusive jurisdiction over final orders of the MSPB. Pub. L. 97-164, §127(a), 28 U.S.C. 1295(a)(9).

[6]Cf. Romane v. Defense Contract Audit Agency, 760 F.2d 1286, 1288 (Fed. Cir. 1985), in which the court also resolved the issue by invoking Meyer, without analysis, notwithstanding contrary holdings by every other circuit to have considered the question.

1368, 1369 (Fed. Cir. 1982) (en banc) (holding rulings of Federal Circuit's predecessor courts, the United States Court of Claims and the United States Court of Customs and Patent Appeals to be binding precedent).

Meyer's analysis of the issue, however, is unsound, and has been soundly rejected by every circuit that has actually considered the question. Schramm v. Department of Health and Human Services, 682 F.2d 85, 91 (3d Cir. 1982); Stankis v. EPA, 713 F.2d 1181, 1185 (5th Cir. 1983); White v. United States Department of the Army, 720 F.2d 209, 213 (D.C. Cir. 1983). Each of these decisions turned on a fundamental canon of statutory construction, that "the plain language of...statute or regulation controls...construction, absent a clearly expressed legislative intention to the

contrary." Stankis v. EPA, supra at 1185 (quoting Oliver v. U.S. Postal Service, 696 F.2d 1129 (5th Cir. 1983) (per curiam)).

Meyer found four factors to be compelling evidence that §7701(c)(1) did not actually mean what it said. Id., 666 F.2d at 544. First, in §4302(a)(3), Congress had an intention to require a personnel system whereby performance appraisals would be used, inter alia, "as a basis for...rewarding...employees." Second, OPM had gone on to require agencies to use performance appraisals in part "[a]s a basis for decisions...to withhold pay increases" under 5 C.F.R. 430.203(i). Third, certain of the applicable legislative history appeared to support this position. See S. Rep. No. 969, 95th Cong., 2d Sess. 10, reprinted in 1978 U.S. Code Cong. & Ad. News 2732 ("The

bill requires that performance evaluations will be used as a basis for all decisions about rewarding, promoting and retaining federal employees"). Most importantly, however, "the impetus behind Congress' passing of the act was its desire to give supervisors more latitude in personnel actions and employees more effective appeal rights," ibid., and Congress simply could not have intended to assign agencies a greater burden of proof in cases where less was at stake. Thus, for purposes of §7701(c)(1)(A), a §5335 case is "an action based on unacceptable performance described in §4303...." Ibid.

This analysis is unsound in several respects. First, it does nothing to respond to the clear, unequivocal language of the statute. That performance appraisals required by §4302 are taken into account in rewarding performance, or

in denying within-grade increases based on performance simply has nothing to do with whether a challenge to denial of a within-grade is an "action based on unacceptable performance, described in §4303." Section 4303, whose heading is "[a]ctions based on unacceptable performance," "describes" only two actions, reduction in grade or removal. §4303(a).

Moreover, the legislative history is by no means unambiguous, as the Fifth Circuit explained in Stankis v. EPA, supra. While acknowledging some support for the view that Congress intended a lesser standard of proof in all performance-related cases, id. at 1185, the court demonstrated that

> there is also ample evidence that Congress meant to distinguish between removals or reductions in grade on one hand and less severe sanctions on the other. The Senate

Committee boasted on how the Act streamlined the procedures for dismissing incompetent employees. [S. Rep. No. 969, 95th Cong., 2d Sess.] at 2, 1978 U.S. Code Cong. & Ad. News at 2724. It urged that incompetent government employees should not merely be retained and disciplined, but should be demoted or fired. Id. at 3, 4, 9, 19, 24, 1978 U.S. Code Cong. & Ad. News at 2725, 2726, 2731, 2741, 2746.

The Senate Report contemplated that the appropriate action to be taken against an incompetent employee is either dismissal or reduction in grade. To these two sanctions, the Act created an easier burden of proof for the government in order to facilitate the dismissal of incompetent employees. The Act changed this standard from the former test of "preponderance of the evidence" to the current substantial evidence. The change in standard was not lightly adopted -- the standard of proof was considered "the most important part" of the reform. Id. at 44, 1978 U.S. Code Cong. & Ad. News at 2766. The Senate Report also acknowledged the seriousness of the removal sanction. Id. at 54, 1978 U.S. Code Cong. & Ad. News at 2776; accord, H. Conf. R. No. 1717, 95th Cong., 2d Sess. 138, reprinted in 1978 U.S. Code Cong. & Ad. News 2860, at 2871. From these excerpts, it appears that Congress was focusing upon a lessened burden

> of governmental proof to demotions or firings based on unacceptable performance than would apply to other sanctions, even if the other sanctions were also based on unacceptable performance...." (citation omitted). Id. at 1185-1186.

See also White v. United States Department of the Army, supra at 212.

Stankis also responds to Meyer's fundamental premise, that Congress simply could not have intended a system assigning the lesser standard of proof to the case in which the graver sanction is sought. Such a system serves to increase the likelihood "that incompetent government employees...not merely be retained or disciplined, but...demoted or fired." Stankis, supra at 1185.

Another reasonable basis for requiring an agency to meet a greater burden of proof in within-grade cases was suggested by the Third Circuit in Schramm

v. Department of Health and Human Services, supra at 90: "The procedural protections [for §4303 cases] are more specific and stringent than those provided an employee under §5335...." For instance, §4302(b)(6) insures that an action based on alleged unacceptable performance will take place "only after an opportunity to demonstrate acceptable performance," and §4303 goes on to prescribe a panoply of procedural safeguards once such an action does take place. An employee is entitled, inter alia, to "30 days advance written notice..." setting out the specific instances alleged and the particular critical elements involved, §4303(b)(1)(A); to "a reasonable opportunity to respond orally and in writing...," (b)(1)(C); to a written

decision, (b)(1)(D); and, of course, to appeal to the Board. §4303(e).

Under §5335(c), however, an employee is entitled to no opportunity to improve performance in advance of a negative ALOC determination. He or she is entitled only to some undefined "prompt written notice" of the determination after

it is made,[7] the opportunity to seek reconsideration of the decision; and to appeal the case to the Board. Congress

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[7]Present OPM regulation does little to clarify the meaning of prompt notice, providing only that the determination "be communicated to an employee in writing as soon as possible after completion of the waiting period...." 5 C.F.R. 531.409(e) (1984). Regulations in force when the Civil Service Reform Act was enacted, 5 C.F.R. 531.401 et seq. (1978), purported to require notification "at least 60 days in advance of the date on which an employee will complete his waiting period...of any factor that raises a question about the employee's work being of an acceptable level of competence...," §531.407(b)(2), and to require that an employee receive any negative ALOC determination not later than the end of the waiting period. §531.407(c)(3). However, these apparent safeguards were more illusory than real, for the regulations also provided that any failure to comply would have no impact on a negative determination or the ultimate decision to deny the increase. See §531.407(c)(4) (failure to inform by end of waiting period "may not be the basis for changing a negative determination"); §531.407(h) (deeming "a determination...not made on a timely basis through administrative oversight, error, or delay [sic]...(2)...to have been made as of the date it would have been made were it not for the administrative oversight, error, or delay").

then could well have intended that an employee accorded such little procedural protection in proceedings preliminary to an appeal have benefit of the more exacting standard of proof before the Board.

Thus, not only is the legislative history ambiguous; there are also sound policy reasons for requiring agencies seeking to sustain denials of within-grade increases before the Board to meet a higher burden of proof in these cases than that required in §4303 cases involving removal or reduction in grade. There is, then, no basis for the Meyer court's departure from clear, unequivocal command of the statute. As the Fifth Circuit held in Stankis,

> The wording of the statute itself is plain and clear. Ambiguous legislative history is not sufficient to sway us from the obvious and plain meaning of the

> statute.... The use of the "preponderance of the evidence" test does not destroy the fundamental purpose of the Civil Service Reform Act. As long as the words of a statute are not contrary to all logic and reason, and these provisions are not, we enforce them. Id. at 1186.

The court below erred in failing to do so. For this reason, the writ should be granted.

CONCLUSION

A denial of within-grade increase can represent a loss of many thousands of dollars to a federal employee during the course of a career in the federal service. Thus this case presents an issue of potentially great significance to every federal employee eligible for a periodic step-increase under §5335. The decision of the United States Court of Appeals for the Federal Circuit assigning agencies a substantial evidence, rather than a

preponderance of the evidence standard of proof in §5335 cases before the Merit Systems Protection Board is contrary to the express mandate of statute; and also contrary to the holdings of every other circuit which has considered the issue. For these reasons, petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit entered February 28, 1986.

Respectfully submitted,

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Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

PATRICIA M. MOUSSEAU,	)	
Petitioner,	)	Appeal No.
v.	)	85-2673
DEPARTMENT OF THE ARMY,	)	
Respondent.	)	

DECIDED: February 28, 1986

Before FRIEDMAN, NIES, and BISSELL, Circuit Judges.

BISSELL, Circuit Judge.

DECISION

The decision of the Merit Systems Protection Board (Board), Docket Number DC531D8410493, affirming the reconsideration decision of the Department of the Army sustaining the denial of a within-grade pay increase for Patricia M. Mousseau is affirmed.

OPINION

Mousseau, a protocol assistant with the United States Army, European Command, Secretary of the Joint Staff, Protocol (agency) was denied a within-grade pay increase (WGPI) by the agency from GS-6 step 4 to step 5 for a rating period ending October 23, 1983. Mousseau was issued a reconsideration decision on April 19, 1984, by the agency affirming the

denial of the WGPI and she appealed this reconsideration decision to the Board.

The Board's presiding official rendered a decision on September 28, 1984, affirming the denial of Mousseau's WGPI. In the decision the presiding official held: "Based on the foregoing, I find that the agency has shown by substantial evidence that it properly denied the appellant a within-grade increase because her performance was not at an acceptable level of competence." The presiding official's initial decision became final pursuant to 5 C.F.R. §1201.113(b) (1984).

The sole issue raised on this appeal by Mousseau is whether "substantial evidence" is the appropriate standard for reviewing the agency's determination to deny her a WGPI.

A review of the record indicates that Mousseau did not raise this issue either before the presiding official or in

her petition for review before the full Board. The agency urges a summary dismissal of the appeal citing this court's holding in Lizut v. Department of the Army, 717 F.2d 1391 (Fed. Cir. 1983). Mousseau counters the agency's argument by contending that our holding in Lizut was premised on a failure of the petitioner "to exhaust his administrative remedies with respect to (these) claims," id. at 1396; that a party is not bound to exhaust his administrative remedies if it is clearly futile to do so; and since the Board was bound to follow the rule of Romane v. Defense Contract Audit Agency, 760 F.2d 1286 (Fed. Cir. 1985), and Meyer v. Department of Health and Human Services, 666 F.2d 540 (Ct. Cl. 1981), it would have been futile for Mousseau to argue otherwise in that forum.

We do not feel compelled to apply our holding in Lizut to this case.

Although we are aware that courts have been inconsistent in applying the "futility" exception to the exhaustion rule and that this exception is subject to abuse (see Etelson v. Office of Personnel Management, 684 F.2d 918, 925 (D.C. Cir. 1982)), a petitioner need not file a pro forma objection at the Board level merely to preserve his right to challenge the holding of one of our decisions binding the Board. As the Court stated in The Montana National Bank of Billings v. Yellowstone County of Montana, 276 U.S. 494, 505 (1982) (footnotes omitted):

> Finally, it is urged that Plaintiff in error may not maintain this action because of its failure to apply to the county board of equalization for an administrative remedy. We do not stop to inquire whether under any circumstances such remedy was open to the taxpayer, for the short answer is that the decision of the Supreme Court of Montana in the Rogers case would have rendered any such application utterly futile since the county board of equalization was powerless to grant any

appropriate relief in the face of that conclusive decision.

Therefore we will address the issue appealed to us. However, Mousseau's contention that "substantial evidence" is the incorrect standard of Board review has already been considered and expressly rejected by this court's predecessor in Meyer v. Department of Health and Human Services, 666 F.2d 540 (Ct. Cl. 1981). In Meyer, the Court of Claims held that the appropriate standard for review by the Board of an agency's decision to withhold an employee's scheduled within-grade pay increase is, under 5 U.S.C. §7701(c)(1)(A), substantial evidence. As Mousseau recognizes, Meyer constitutes binding precedent on this court pursuant to its decision in South Corp. v. United States, 690 F.2d 1368, 1370-71 (Fed. Cir. 1982) (in banc), and cannot be altered absent reconsideration in banc.

Mousseau's argument is identical to that recently rejected by this court in Romane, 760 F.2d at 1288. In that case, we declined a suggestion for a hearing in banc to reconsider Meyer, noting that no member of the panel nor any judge on the court had requested a polling on a hearing in banc. The same holds true in this case. Accordingly, the decision of the Board is affirmed.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

PATRICIA M. MOUSSEAU,	)	DOCKET NUMBER
Appellant,	)	DC531D8410493
v.	)	
DEPARTMENT OF THE ARMY,	)	DATE:
Agency,	)	MAY 28, 1985

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis L. Devaney, Member

ORDER

Having fully considered appellant's petition for review of the

initial decision issued on September 28, 1984, and finding that it does not meet the criteria for review set forth at 5 C.F.R. §1201.115, the Board DENIES the petition.* Weaver v. Department of

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*The agency denied appellant's within-grade increase for failing to perform at an acceptable level of competence in three critical elements of her position requiring her to prepare items for formal dinners, prepare items for formal luncheons, and maintain listings of key individuals. The agency cited several incidents in which appellant failed to meet the standards for these critical elements to support its decision.

Appellant contends that the presiding official erred in finding that appellant failed to meet a performance standard for the first critical element because she had omitted a couple's name from the guest list for a dinner. The presiding official found that although the standard allowed for two correctable errors, it referred to typographical errors, not omissions. See Id. at 3. We find that the presiding official erred in this regard. The standard specifies only "errors" in general and the presiding official did not cite any evidence to support her conclusion that it meant only typographical errors. Further, in a grievance decision dated October 13, 1983, Col. James Boyle found that this incident did not show appellant's failure to meet the performance standard. See attachment

the Navy, 2 MSPB 297 (1980) (mere

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to Petition for Review.

Appellant also contends that the presiding official erred in sustaining a specification concerning the second critical element on the basis that appellant failed to follow her supervisor's deadline for completing items for a luncheon because her second-line supervisor gave her permission to complete the task the next day. We agree that the presiding official erred in sustaining the specification. Therefore, we find the agency has not established that these two incidents show appellant's failure to meet the performance standards for these two critical elements. Notwithstanding this, however, we find that the other incidents, which were sustained in the initial decision, show appellant's unacceptable performance in the three critical elements and justify the agency's denial of her within-grade increase based on her failure to perform at an acceptable level of competence.

Appellant also argues that the agency improperly denied her within-grade increase to force her from her position. The written record does not show that appellant raised this below and therefore it should not be considered on review. Banks v. Department of the Air Force, 4 MSPB 342, 343 (1980). In any event, appellant is merely speculating that this must be true because, in her opinion, the cited incidents do not warrant the within-grade denial. She submits documents that allegedly support her argument, but she has failed to establish that they constitute new and material

disagreement with the presiding official's factual and credibility findings does not provide a basis for Board review).

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. §1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. §7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the

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evidence that was unavailable when the record closed. Therefore, they have not been considered on review. See Avansino v. United States Postal Service, 3 MSPB 308 (1980).

court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WASHINGTON REGIONAL OFFICE

PATRICIA M. MOUSSEAU	)	CASE NUMBER
	)	DC531D8410493
v.	)	
	)	DATE
DEPARTMENT OF THE ARMY	)	Sept. 28, 1984

DECISION

On June 4, 1984, the Board received an appeal from Ms. Mousseau from the action taken by the Headquarters, United States European Command, Secretary of the Joint Staff, Protocol, denying her, on reconsideration, a within-grade increase for her performance during the period of October 23, 1981 to October 22, 1983. The

appellant is a full-time employee in a permanent general schedule position who is entitled to appeal this action. 5 U.S.C. §5335(c); 5 C.F.R. §531.407(e); Parker v. Defense Logistics Agency, 1 MSPB 489 (1980).

The appellant was charged with failing to perform three critical job elements at an acceptable level of competence. Agency evidence in support of its position includes the agency submission in response to the petition for appeal and the testimony of the appellant's supervisors. The appellant's evidence in support of her position includes exhibits and her testimony and that of other witnesses. The parties entered into a stipulation of the anticipated testimony of two witnesses who were not available at the time of the hearing.

Preparing items for formal dinner

The appellant's performance standard and the job description for the position that she encumbered indicate that she is required to prepare handwritten invitations for delivery, to contact guests and to prepare guest lists. (Agency Submission, tabs 3 and 2).

The appellant's second-level supervisor, Lt. Col. Willoughby, testified that he instructed the appellant to prepare a dinner invitation for General and Mrs. Domrose and have it sent to the residence of General and Mrs. Smith with the dinner board (which showed seating arrangements). The agency stated that Mrs. Smith had also asked that the appellant have the invitation sent with the dinner board. Lt. Col. Willoughby stated that the appellant told him that she had talked to

the Domroses and that they did not need an invitation. He testified that he did not recall whether he made it clear that an invitation was still needed for the Domroses. He indicated that the appellant did not send the invitation with the dinner board and that, on July 18, 1983, he had to again request that she send the invitation. The appellant testified that she does not believe that Mrs. Smith instructed her to send the Domrose invitation and that no one in the agency passed Mrs. Smith's instruction on to her. She indicated that she was not told about the second invitation until July 18th. Because the supervisor was not certain that he made it clear that the invitation was needed and the appellant does not remember the first instruction, I do not sustain this charge.

The second-level supervisor testified that on June 17, 1983, he instructed the appellant to prepare two dinner invitations so that they could be mailed and then prepare two "to remind" invitations that could be hand carried. He indicated that the appellant did the two "to remind" invitations first and missed the deadline of 6:30 p.m. for the completion of the two dinner invitations. The appellant testified that one envelope needed to be typed for mailing a guest list and one "to remind" invitation needed to be prepared. She indicated that she could have just barely met the deadline if the supervisor had not agreed that she could mail the two items on the way home and not use the German Mail System box that was scheduled to be emptied at 6:30 p.m. It appears from this testimony that the appellant did not meet the deadline but that the items were mailed that

evening. I find, therefore, that the charge is sustained. (I note, however, that such a charge standing alone would be insufficient a basis for denial of a within-grade increase.)

The appellant's immediate supervisor, First Sgt. Lowery, testified that on March 24, 1983, the appellant neglected to include a couple's name on a guest list and that this put General and Mrs. Smith in an embarrassing situation. She stated that the appellant admitted that she was responsible for the omission. The appellant testified that the General and the couple were not aware that the couple's name was not on the guest list. Because several people had to rapidly cover the problem, an embarrassing situation did occur. The appellant contends that the performance standard allowed for two errors in the preparation

of guest list. The relevant performance standard states that the appellant "types and proofs (guest) list(s) in 22-25 minutes with no more than 2 correctable errors". This language appears to refer to typographical errors that presumably would be corrected. It does not appear to authorize the maintenance of omissions in a final guest list that is being used at a function. Accordingly, I find that the charge is sustained.

The appellant's immediate supervisor, First Sgt. Lowery testified that on July 25, 1983, she told the appellant to prepare invitations for two couples and to send them to Mrs. Smith; that the appellant worked overtime to complete the task; and that the appellant did not perform the assignment. The appellant testified that she completed two envelopes but that another employee was told to

prepare the invitations. The appellant does not indicate whether the employee was told to prepare the invitations initially or after she did not complete the task. It does not appear that the appellant completed the assignment. After having observed the demeanor of the supervisor and the appellant and the directness with which the supervisor responded to questions, I find the testimony of the supervisor to be more credible. See Weaver v. Department of the Navy, 2 MSPB 297 (1980).

First Sgt. Lowery testified that on June 3, 1983, the appellant was instructed to call guests for a dinner, to type a guest list and to do a schedule; and that at the close of business, the appellant had not completed the tasks. The agency charged that the supervisor was required to work overtime to complete the task. The

appellant testified that she was not told to stop what she was working on, a Command Group Schedule, and work on the dinner. She indicated that she only stopped doing one assignment to perform another for "time-sensitive" matters and to answer telephone calls. She stated that the protocol office files indicated that the dinner was set for June 16, 1983 and that she did not know that the dinner was scheduled for June 6th. I do not find it plausible that the appellant would call guests to invite them to an activity and not determine the correct date of that activity. Further, this activity which was only a few days away appears to be a "time sensitive" matter requiring immediate attention. I find, therefore, that the appellant did not complete the task in a timely fashion.

Prepare items for formal luncheons

The appellant's performance standards indicate that she is required to prepare and type proposed guest lists, type final guest lists, type and distribute seating plans, prepare a sign for the Commander in Chief's Mess door, type cards for place settings and the mess board, telephonically reverify attendance and set up the board and place cards.

The supervisor testified that she told the appellant to have the items for the March 18, 1983 luncheon ready by 5:00 p.m. the day before and that the appellant did not complete the task on time. She indicated that forty days prior to this the appellant had experienced difficulty in having the items ready by 10:00 a.m. on the day of a luncheon and that the deadline had been adjusted. She noted

that the appellant had met the adjusted deadline until March 17th. The appellant testified that she was still working on preparations for the March 24, 1983 dinner, that she asked Lt. Col. Willoughby if she could continue and prepare the luncheon items on the following day, and that he gave her permission to complete the task the next day. While the appellant obtained permission from the second-level supervisor, she did not follow the instructions of her immediate supervisor. I find that the appellant did not meet the deadline given her by her immediate supervisor. (This charge alone is not sufficient to deny a within-grade increase.)

The supervisor testified that the appellant was assigned the routine task of calling invitees on lists for March 25th and 29th luncheons and that on March 21,

1983, the appellant said she would be unable to perform the task. The supervisor stated that two other employees had to place the calls. The appellant testified that when she received the luncheon lists, she was working on the March 24th activity and was assigned the Command Group Schedule to complete. The appellant indicated that Sgt. Lowery had told her that when she had an overload of work, she should notify her so that she could reprioritize her assignments. The appellant stated that she informed the supervisor of the tasks that she had to perform and the supervisor reassigned the lists. For the reasons mentioned previously, i.e., the demeanor of the supervisor and the appellant and the way that they responded to questions, I find the testimony of the supervisor to be more credible. The charge is, therefore, sustained.

The supervisor testified that on May 2, 1983 at 1:35 p.m., she instructed the appellant to add two lines to a guest list and to prepare another guest list and have it in the office of the Deputy Commander in Chief by 5:00 p.m. The agency indicated that at 4:45 p.m., the appellant had not started the list and that she did not complete it until 5:45. The supervisor stated that she had made certain that the appellant was not interrupted. The agency included in its response to the petition for appeal, a copy of a note dated May 2nd which supports her testimony. (Ag. Sub., tab 5H) The appellant testified that at 5:10 p.m., she was instructed to add two names to a guest list.

The notice of denial of within-grade increase only stated that at 1:35, the

appellant was instructed to add two lines to the guest list and to have it in the office of the Deputy Commander in Chief by 5:00 p.m. Notwithstanding the supervisor's testimony as to what the charge should have been, I will limit my considerations to the charge in the notice. For the above-mentioned reasons, I find the testimony of the supervisor to be more credible and the charge, as limited, is sustained.

The supervisor testified that on June 22, 1983, she found that the appellant had used Four Star Blue place cards that were to be used for Deputy Commander in Chief functions rather than the appropriate Three Star Red place cards that should have been used for the Chief of Staff Luncheon. She indicated that 12-14 cards needed to be replaced. The supervisor testified that the appellant, on October

11, 1983, typed Four Star Air Force place cards for a luncheon when she should have used Three Star Army place cards. The appellant testified that the errors were just oversights and that no one counseled her to tell her that it was a problem. The record reflects, however, that in an August 31, 1983 notice of failure to satisfy performance standards the appellant was advised that her use of the wrong place cards on June 22, 1983 was unsatisfactory. The second incident occurred after the notice. Accordingly, I find that the appellant was aware of what was expected of her. I find that the charge is sustained.

Maintaining a listing of key individuals

The appellant's performance standard indicates that she is required to prepare

and maintain the Protocol Reference Book and to revise all sections of the Book within a six-month period with 95% accuracy.

The supervisor testified that one of the appellant's duties was to update the Protocol Reference Book (the Blue Book) and that the appellant was instructed on February 15, 1983 to update it by March 11th. She indicated that on March 7, 1983, the appellant told her that she had not been able to update the Book. She stated that the completion date was moved back and that the appellant was authorized overtime to complete the task. The supervisor testified that in July when the Blue Book was typed into a word processor, a review of the Book revealed that the appellant had not updated the material as she should have. The supervisor indicated that the appellant had been advised that

the office would be presenting a copy of the Blue Book to General and Mrs. Smith before they departed on July 28th. The agency noted that because the appellant had not kept the Blue Book current, the office was unable to meet this date.

The appellant testified that she never assured the agency of any completion date for the Blue Book and that she did not know of the plan to give General and Mrs. Smith a copy of the book. The appellant stated that she had written changes in her copy of the Blue Book and that notations of other changes that needed to be made were kept in a folder in her drawer. She stated that she had told everyone about the folder. The appellant indicated that some of the changes such as a page with one name on it could be stapled into the Book, but that changes such as a list of names could not go in on any one page but

had to be incorporated (apparently, in alphabetical order) to fit the format of the Book. The appellant does not seem to understand that when she is given an assignment, her assurance that she will complete the task as instructed is not necessary to make the assignment valid. By her having updated material in a place other than the Blue Book and not incorporating the material into the Book, the appellant admits that she did not complete the task.

The agency charged that the appellant had offered some suggestions for changes to the Blue Book that were unnecessary. The appellant contends that she offered suggestions which she thought would improve the format and that the agency did not have to make them if they were unwanted. I agree and I do not sustain

this charge as a basis for denial of a within-grade increase.

The appellant contends that because the performance appraisal is the subject of a grievance, it was inappropriate for the agency to consider matters raised in the performance appraisal as a basis for denying the appellant a within-grade increase. Performance appraisals are to be used as a basis for a decision to deny a within-grade increase. 5 C.F.R. §430.204(s)(2). The appellant has cited no statute or regulation which authorizes the use of another basis for a decision on a within-grade increase or requires the deferring that decision when the performance appraisal has been the subject of a grievance. Nor am I aware of any.

The appellant contends that the effective dates of the performance standards on

which she was evaluated for a within-grade increase were effective from February 16, 1983 to June 16, 1983. She indicates that since some of the incidents referred to in the notice and decision letter occurred after June 16, 1983, the denial is erroneous, apparently because no standard existed.

The document to which the appellant refers, a "Job Planning Worksheet" indicates that the rating period was from February 16, 1983 through June 16, 1983. The job description for the position that the appellant encumbered listed the duties that she was expected to perform during the waiting period for an increase from a GS-6, step 4 to a GS-6, step 5 level. (Ag. Sub., tab 2) The appellant was told in the worksheet the critical job elements for the position, the supporting tasks to be accomplished and the performance

standards expected. The supervisor's testimony and her notes reflect that the appellant was counseled from March, 1983 through July, 1983, as to what was expected of her. (Ag. Sub., tab 5H) In a letter of warning dated August 31, 1983, the appellant was reminded of the critical job elements in which her performance was considered deficient and of specific instances of these deficiencies. Accordingly, I find that the appellant was aware of the performance standards and the level of performance that was expected of her. I find, therefore, that the allegation that no standard existed is not supported. Ross v. Department of the Army, 3 MSPB 208 (1980).

The appellant contends that the agency disregarded her performance during the other 17 months not mentioned in the notice letter. The appellant submitted a

stipulation entered into by the parties and the testimony of witness which indicated that the appellant completed her tasks correctly and in a timely fashion. None of the individuals had supervised the appellant.

By testimony of the supervisors, the agency indicated that the appellant's performance throughout the period was considered. They testified that the appellant was competent and that generally, when work was completed, it was well done. They indicated that the appellant consistently had difficulty in setting priorities and in meeting deadlines. It is apparent, from the record, however, that the agency closely scrutinized the appellant's performance during the seven months in question. It is not error to closely scrutinize an employee's work for a limited period of

time. Hurt v. Department of Health and Human Services, 3 MSPB 507 (1980).

Based on the foregoing, I find that the agency has shown by substantial evidence that it properly denied the appellant a within-grade increase because her performance was not at an acceptable level of competence. See Parker v. Defense Logistics Agency, 1 MSPB 489 (1980).

APPEAL RIGHTS

This is an initial decision of the Merit Systems Protection Board. Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing an original and two copies of a petition for review with:

Office of the Clerk
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. §§1201.114-.115. The petition for review must be filed on or before November 2, 1984 and must set forth objections to the initial decision, supported by references to applicable laws or regulations and with specific reference to the record.

This initial decision will become a final decision of the Board on November 2, 1984, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. §§1201.113 and .117.

Any appellant adversely affected or aggrieved by a final decision of the Board may obtain judicial review if the Court

has jurisdiction over the matter by filing a petition with the:

U.S. Court of Appeals for the
Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Such a petition may not be filed as long as the case is pending before the Board. To be timely, the petition must be received by the Court within 30 days of the final Board decision. 5 U.S.C. §7703(b)(1).

ENFORCEMENT

Any party seeking enforcement of a final decision must file a petition of enforcement with this office in accordance with 5 C.F.R. §1201.181.

ATTORNEY FEES

When the appellant has prevailed and has been represented before the Board by an attorney, he or she may request payment of attorney fees. Any such request must be filed with this office within 10 days of the date that this decision becomes final. 5 C.F.R. §1201.37.

For the Board:

Anita Marshall
Presiding Official

Supreme Court, U.S.
FILED
JUL 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1971

In the Supreme Court of the United States

OCTOBER TERM, 1985

PATRICIA M. MOUSSEAU, PETITIONER

v.

DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a civilian employee of the Department of the Army, contends that the Merit Systems Protection Board (MSPB) improperly reviewed the Army's denial of her within-grade pay increase under the substantial evidence standard rather than the preponderance of the evidence standard.

1. Petitioner has been a civilian employee of the Army since 1977 and, at the time this action arose, was a GS-6 protocol assistant (Pet. App. A2). In March 1984 the Army formally notified petitioner that it intended to withhold the within-grade pay increase from step 4 to step 5 otherwise due to her (Pet. 6-7). The Army based its decision upon petitioner's failure "to perform three critical * * * elements [of her position] at an acceptable level of competence" (Pet. App. C2).

Petitioner sought and was granted a hearing before the MSPB. The MSPB presiding official ruled that the Army was required to prove by substantial evidence that it properly denied petitioner's within-grade pay increase and that the Army had carried its burden (Pet. App. C23). Petitioner sought review of the presiding official's ruling. The petition for review, which did not question the presiding official's use of the substantial evidence standard, was denied (Pet. App. B1-B5).

The court of appeals affirmed (Pet. App. A1-A7). The court rejected petitioner's claim that the preponderance of the evidence standard is the correct standard for review by the Board of an agency's decision to withhold an employee's scheduled within-grade pay increase. The court of appeals stated (Pet. App. A6) that petitioner's argument had been considered and expressly rejected by its predecessor, the Court of Claims, in *Meyer* v. *Department of Health & Human Services*, 666 F.2d 540 (1981). In *Meyer*, the Court of Claims held that the appropriate standard for review by the Board of an agency's decision to withhold an employee's scheduled within-grade pay increase is whether the agency's decision is supported by substantial evidence. The court of appeals declared that, pursuant to its decision in *South Corp.* v. *United States*, 690 F.2d 1368, 1370-1371 (Fed. Cir. 1982) (en banc), it was bound by the decision in *Meyer* and could not alter it absent reconsideration en banc (Pet. App. A6). The court added that petitioner's argument is identical to one recently rejected by the court in *Romane* v. *Defense Contract Audit Agency*, 760 F.2d 1286 (Fed. Cir. 1985) (Pet. App. A7). In that case, the court of appeals declined a suggestion to reconsider *Meyer* en banc, noting that no member of the panel and no judge on the court had requested a polling on a hearing en banc (*ibid.*).

2. For the reasons set forth in our opposition to the petition for a writ of certiorari in *Marques* v. *Department of Health & Human Services*, 776 F.2d 1062 (Fed. Cir. 1985) (Table), cert. denied, No. 85-1463 (May 27, 1986)—where the petitioner also contended that denials of within-grade pay increases should be evaluated under the preponderance of the evidence standard—petitioner's claim that the MSPB improperly reviewed the Army's denial of her within-grade pay increase under the substantial evidence standard is without merit.[1] In addition, as we noted in our opposition in *Marques*, the Federal Circuit now has exclusive jurisdiction over appeals from MSPB decisions in such cases (see 5 U.S.C. 7703(b)(1) and 28 U.S.C. 1295(a)(9)), so the conflict in the circuits to which petitioner refers (Pet. 14) is of no continuing importance. Indeed, the interpretation of the MSPB's enabling statute is a matter within the Federal Circuit's special competence, and that court was created because of the need for a forum "short of the Supreme Court" to provide uniform answers to matters within the court's special competence (S. Rep. 97-275, 97th Cong., 1st Sess. 3 (1981)). Accordingly, the question presented does not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1986

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[1]We have sent a copy of our brief in opposition to the petition for a writ of certiorari in *Marques* to counsel for petitioner.